



January 3, 2002

Mr. John S. Schneider, Jr.  
First Assistant City Attorney  
City of Pasadena  
P.O. Box 672  
Pasadena, Texas 77501

OR2002-0042

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156826.

The City of Pasadena (the "city") received a request for "all documents which would reasonably constitute the [city's] 'Cable File.'" You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions claimed, the representative sample of information submitted as Exhibits A through D, and the comments provided by the requestor.<sup>1</sup> See Gov't Code § 552.304 (permitting interested party to submit reasons why requested information should or should not be released).

We first address the disagreement concerning when the city received the request for information at issue. You represent that the city received the request on October 10, 2001, while the requestor advises us that the request was received on September 14, 2001. The requestor, however, has not provided us with any proof establishing the earlier date of receipt. Moreover, we cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Thus, we rely on your signed statement and conclude that the request was received by the city on October 10, 2001.

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Turning now to Exhibit A, you claim this exhibit contains information that is excepted from disclosure under section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit,

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). In this instance you simply refer to "potential litigation" and do not provide us with any concrete evidence that litigation may ensue. Thus, you have not met your burden of establishing that litigation is reasonably anticipated, and as a result, none of the information in Exhibit A may be withheld under section 552.103.

You further claim that some of the information in Exhibit A is excepted from disclosure because it is attorney work product. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *National Tank v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993). Here, you have not shown a substantial chance of litigation. Again, you only refer to "potential litigation" without providing any further explanation or evidence that litigation may occur. Consequently, you may not withhold any information in Exhibit A under section 552.111.

You also claim that Exhibit A is excepted from public disclosure under section 552.107. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3.

Some of the records in Exhibit A consist of communications between the city and its attorneys. You represent that these communications reveal the city's confidences and consist of legal advice and opinions rendered for the city as the client. Having reviewed these communications, we agree that, in some instances, they reveal the city's confidences or the attorney's legal opinion or advice. Therefore, you may withhold the information we have marked under section 552.107(1).

You next contend that Exhibits B, C, and D are excepted from disclosure under section 552.106. Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. Section 552.106(a) protects drafts of legislation that reflect policy judgments, recommendations, and proposals prepared by persons with some official responsibility to prepare them for the legislative body. *See* Open Records Decision No. 429 at 5 (1985). The term "legislation" includes drafts of municipal ordinances that reflect policy judgments, recommendations, and proposals. *See* Open Records Decision No. 248 (1980). In this instance, Exhibits B, C, and D do not contain drafts of the ordinance you reference in your correspondence to this office, nor do they reflect policy judgments, recommendations, or proposals. Hence, you may not withhold any of the information in Exhibits B, C, and D under section 552.106.

We note, however, that Exhibit C contains personal financial information made confidential under section 552.101 in conjunction with common-law privacy.<sup>3</sup> Under section 552.101, information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We have reviewed Exhibit C and find that the personal financial information it contains does not relate to a financial transaction between an individual and a governmental body. Therefore, the city must withhold the information in Exhibit C that we have marked pursuant to section 552.101 in conjunction with the common-law right of privacy.

We further note that some of the exhibits contain e-mail addresses of members of the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the

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<sup>3</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Government Code. This new exception makes certain e-mail addresses confidential.<sup>4</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Section 552.137 requires the city to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the members of the public consented to release in this instance, the city must withhold the e-mail addresses we have marked under section 552.137.

In sum, you may not withhold any information in Exhibit A under sections 552.103 or 552.111, nor may you withhold any information in Exhibits B, C, and D under section 552.106. You may, however, withhold the information we have marked in Exhibit A under section 552.107, and you must withhold the personal financial information we have marked in Exhibit C under section 552.101. Also, you must withhold the e-mail addresses we have marked in the exhibits pursuant to section 552.137. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

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<sup>4</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

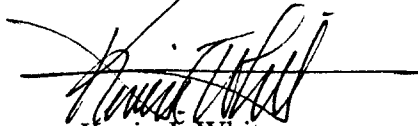
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. White", is written over a horizontal line.

Kevin J. White  
Assistant Attorney General  
Open Records Division

KJW/seg

Ref: ID# 156826

Enc. Marked documents

c: Mr. Boyd Fisher  
1909 Jessie Lane  
Pasadena, Texas 77502  
(w/o enclosures)